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Docket No.

In the Supreme Court of the United States

OCTOBER TERM 1983

KAY J. BROWN, Administratrix of the
Estate of Edward Carol Brown, deceased,
KAY J. BROWN, Individually,
RONNIE EDWARD BROWN, an infant by his
Guardian ad litem, Wiley G. Gary, and
TIMOTHY EARL HOGGARD,
Petitioners,

v.

PATRICIA ANN BROWN
and
ALLIED TOWING CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Alan P. Owens
SMITH & OWENS
250 Monticello Arcade
Post Office Box 3646
Norfolk, Virginia 23514
(804) 622-1621

Counsel for Petitioner

QUESTIONS PRESENTED

I. WHETHER THE FEDERAL GENERAL MARITIME LAW AS SET FORTH IN MORAGNE V. STATES MARINE LINES, INC., CREATES A FEDERAL RIGHT OF RECOVERY FOR THE NEGLIGENTLY CAUSED WRONGFUL DEATH OF A SHIP REPAIRMAN OCCURRING UPON THE NAVIGABLE WATERS OF THE UNITED STATES WITHIN THE TERRITORIAL WATERS OF A STATE.

II. WHETHER THE RIGHT TO RECOVER FOR WRONGFUL DEATH OF A SHIP REPAIRMAN UNDER THE GENERAL MARITIME LAW AS SET FORTH IN MORAGNE PREEMPTS THE STATE WRONGFUL DEATH ACTS.

III. WHETHER UNDER 33 U.S.C. SECTIONS 905 AND 933 OF THE LONGSHOREMEN'S AND HARBOR WORKERS'

COMPENSATION ACT CONGRESS HAS RECOGNIZED AND/OR CREATED A UNIFORM FEDERAL RIGHT OF RECOVERY FOR THE NEGLIGENTLY CAUSED DEATH OF A MARITIME WORKER COVERED BY THE ACT OCCURRING UPON NAVIGABLE WATERS OF THE UNITED STATES WITHIN THE TERRITORIAL WATERS OF A STATE.

IV. WHETHER ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES REQUIRES THE UNIFORM APPLICATION OF SUBSTANTIVE ADMIRALTY LAW TO ACTIONS FOR WRONGFUL DEATH BROUGHT UNDER THE "GENERAL MARITIME LAW OF THE UNITED STATES" ARISING OUT OF MARITIME TORTS OCCURRING UPON THE NAVIGABLE WATERS OF THE UNITED STATES WITHIN THE TERRITORIAL WATERS OF A STATE.

V. WHETHER THE UNIFORMITY OF ADMIRALTY AND MARITIME LAW AS

CONTEMPLATED BY ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES AND FEDERALLY DEVELOPED MARITIME PRINCIPLES, IN CASES ARISING OUT OF NEGLIGENTLY CAUSED DEATHS OCCURRING ON NAVIGABLE WATERS OF THE UNITED STATES, PROHIBITS THE APPLICATION OF SUBSTANTIVE STATE LAW PRINCIPLES WHICH ARE IN CONFLICT WITH SUBSTANTIVE ADMIRALTY LAW.

VI. WHETHER THE APPLICATION OF SUBSTANTIVE STATE LAW PRINCIPLES WHICH ARE IN CONFLICT WITH SUBSTANTIVE FEDERAL ADMIRALTY PRINCIPLES, IN DETERMINING THE RIGHTS AND LIABILITIES OF A SHIP REPAIRMAN, KILLED UPON NAVIGABLE WATERS OF THE UNITED STATES WITHIN THE TERRITORIAL JURISDICTION OF THE STATE OF VIRGINIA, CONTRAVENES THE PROVISION OF ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES.

VII. WHETHER A PRIOR FEDERAL COURT FINDING OF FEDERAL MARITIME ADMIRALTY JURISDICTION ARISING OUT OF THE WRONGFUL DEATH OF A SHIP REPAIRMAN UPON THE NAVIGABLE WATERS OF A STATE PRECLUDES A STATE COURT IN A SUBSEQUENT ACTION FROM FINDING THAT THERE IS NO FEDERAL ADMIRALTY JURISDICTION.

THE PARTIES TO THE PROCEEDING BELOW

Allied Towing Corporation is a nominal party only, having settled with the Administratrix and deposited the settlement funds with the trial court. Timothy Earl Hoggard has reached majority and is now represented by petitioner's counsel. The other parties are as stated in the caption of the case in this Court.

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No.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1983

KAY J. BROWN, Administratrix of the Estate of Edward Carol Brown, deceased, KAY J. BROWN, Individually, RONNIE EDWARD BROWN, an infant by his Guardian ad litem, Wiley G. Gary, and TIMOTHY EARL HOGGARD,

Petitioners

v.

PATRICIA ANN BROWN

and

ALLIED TOWING CORPORATION,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner, Kay J. Brown, respectfully prays that a Writ of Certiorari issue to review the order of the Supreme Court of Virginia entered in this proceeding on December 2, 1983, and

the Order of January 20, 1984, denying the Petition for Rehearing.

OPINIONS BELOW

The Petitioner herein, Kay J. Brown, seeks a Writ of Certiorari to review the judgment and decision of the Supreme Court of Virginia in the case of Brown v. Brown, Admx., et al, 226 Va. ____; 226 VRR 301; as yet not officially reported appears in Appendix A. The decision reversed the trial court's holding that the federal general maritime law was applicable to petitioner's claim.

The Letter Opinion of Honorable John W. Winston, dated October 31, 1980 from the Circuit Court of the City of Norfolk appears in Appendix D. The

unreported Order dated March 10, 1980 entered by the Honorable Richard B. Kellam of the U. S. District Court for the Eastern District of Virginia, Civil Action No. 77-124-N allowing the Administratrix to prosecute her claim in State Court where she may have a trial by jury appears in Appendix G. Allied's conviction for maritime homicide, including Brown's, occurring within the admiralty jurisdiction of the United States upheld United States v. Allied Towing Corporation, 602 F.2d 612 (4th Cir. 1979) appears in Appendix H. The prior Federal Court Opinions dealing with the liability of Allied in admiralty for the explosion and the right of Brown's Administratrix to pursue her action under the Longshoremen's and Harbor Workers' Compensation Act are, Allied Towing

Corporation v. Tatem, 580 F.2d 702 (4th Cir. 1978), Appendix I; Complaint of Allied Towing Corp., 416 F.Supp. 1207 (E.D.Va.1976) Appendix J; and Complaint of Allied Towing Corp., 409 F.Supp. 180 (E.D.Va.1976) Appendix K.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

On December 2, 1983, the Supreme Court of Virginia entered its opinion and order reversing the Circuit Court of the City of Norfolk. A timely filed Petition for Rehearing was denied by an order entered January 20, 1984. On March 21, 1984, the Virginia Court entered an order staying execution of judgment to and including April 19, 1984. Jurisdiction is invoked pursuant

to 28 U.S.C. Sections 1257(3) and 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Article III, Section 2

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority. . .to all cases of admiralty and maritime jurisdiction."

Constitution of the United States, Article IV.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the

authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

28 U.S.C. §1333, Savings to Suitors Clause

"Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for

the condemnation of property taken as prize."

33 U.S.C. §905
Longshoremen's and Harbor Workers' Compensation Act (set out in Appendix L-1)

33 U.S.C. §933
Longshoremen's and Harbor Workers' Compensation Act (set out in Appendix L-5)

Section 8.01-50, et seq. of Virginia Code, Death by Wrongful Act (appears in Appendix M)

STATEMENT OF THE CASE

This action grows out of an accident on March 17, 1975, when Edward Carol Brown lost his life in an explosion and fire aboard the Tank Barge ATC 3060, owned and operated by Allied Towing Corporation (Allied). At the time of the explosion and fire, Edward Carol Brown, a shipyard welder and an employee of Allied, was performing maritime services aboard his employer's tank barge which was then afloat on the navigable waters of the United States at Norfolk, Virginia.

Following the explosion and fire, on April 10, 1975, Allied filed a complaint in the U. S. District Court for the Eastern District of Virginia, seeking the admiralty remedy of exoneration from, or limitation of liability, as a result of the explosion and fire, pursuant to 46 U.S.C. Section

181, et seq. A claim was filed by the Administratrix in this limitation proceeding on June 6, 1975. All claimants in the limitation proceeding were enjoined from prosecution of claims except in that proceeding. Thereafter on March 9, 1976, the District Court denied Allied's petition for exoneration, ruling that its negligence as a shipowner proximately caused the explosion (Complaint of Allied Towing Corporation), 409 F.Supp 180 (D.C. Va. 1976). (Apps. K-34-35;J-13,15).

Subsequently, on August 2, 1976, the District Court dissolved the restraining order entered April 10, 1975, thus permitting the claimants to proceed with the actions and repair to the forum of their choice (Complaint of Allied Towing Corporation), 416 F.Supp. 1207 (D.C. Va. 1976). (App. J-15).

On November 24, 1976, for the purpose of guaranteeing to the Administratrix the right of trial by jury under the "savings to suitors" clause of 28 U.S.C. 1333, there existing no diversity jurisdiction, she filed a motion for judgment in the Circuit Court of the City of Norfolk alleging that her decedent met his death as a result of the negligence of the defendant Allied acting as a shipowner and that a federal question was involved by alleging "This claim is governed by the General Maritime Law of the United States." (App. F-5). She demanded damages for his dependent survivors.

It thereafter came to the attention of the Administratrix that the federal court had allowed a jury trial in a companion case. Therefore, on February 11, 1977, the Administratrix filed a

suit in the United States District Court, claiming compensatory "Moragne-type damages" as well as other damages under the applicable maritime law demanding trial by jury. By this time, Allied had begun the appellate process. The denial of the exoneration and the permitting of the actions under §905(b) of the Longshoremen's and Harbor Workers' Compensation Act [hereinafter LHWCA], against Allied was affirmed by the Fourth Circuit Court of Appeals on July 18, 1978 (Allied Towing Corporation v. Tatem), 580 F.2d 702 (4th Cir. 1978). (App. I-10,11).

Thereupon further proceedings on the claims were delayed by Order of Judge J. Calvitt Clarke, Jr., entered September 4, 1978, pending the outcome of another admiralty case originating in the Norfolk Division of the Eastern

District of Virginia. Edmonds v. Compania Generale Transatlantique, 577 F.2d 1158 (4th Cir. 1978), which was then subject of a petition for certiorari to the Supreme Court of the United States. This Court accepted the case and decided Edmonds on June 27, 1979, 443 U.S. 256, 61 L.Ed2d 521, 99 S.Ct. 2753.

Judge Clarke, in response to Edmonds, on October 25, 1979 entered an order holding "that the ship repairmen plaintiffs in these cases cannot have deducted from any verdict rendered in their favor an amount equal to the percentage of negligence of Allied as a ship repairer...if any...." In an ancillary criminal proceeding arising out of Mr. Brown's death, United States v. Allied Towing Corporation, 602 F.2d 612 (4th Cir.

1979) (App. H-19), the Fourth Circuit upheld Allied's district court conviction for homicide occurring on navigable waters which are in the federal admiralty jurisdiction as well as in the territorial jurisdiction of a state.

On November 6, 1979, the United States District Court set a trial with jury on April 17, 1980. On January 22, 1980, the District Court denied a jury trial to the Administratrix, stating "it is clear there is no right to a jury trial in admiralty."

In order to retain her right to a jury trial with admiralty principles, it was necessary for the Administratrix to request the federal court to dismiss the then pending federal court action so as to allow her to prosecute her still pending action in the Circuit Court of

the City of Norfolk. An Order, entered on March 10, 1980, (App. G) granted the Administratrix's motion, thus ending approximately five years litigation on the admiralty side of the United States District Court.

The Federal Court's Opinion and Order dated August 2, 1976 (Complaint of Allied Towing Corporation, etc., 416 F.Supp. 1207) stated "The Court's findings of fact and conclusions of law are res judicata or collateral estoppel in any subsequent proceedings."(App. J-13).

After the Federal Court's dismissal without prejudice, the Administratrix resumed the prosecution of her pending maritime claim on the issue of damages only in the Circuit Court of the City of Norfolk, which came on for trial on June 18, 1980. After approximately one-half

day of trial, the claims were settled when Allied agreed to pay the sum of $400,000.00 into the court and to waive its statutory lien for repayment of approximately $76,000.00, paid to the decedent's dependents under the LHWCA.

Thereafter, the trial court conducted a hearing to determine the distribution of approximately $265,000 remaining in the fund after payment of counsel fees and costs. The evidence at the hearing showed that, in addition to his wife Kay, Brown was survived by their son, Ronnie, born December 15, 1968, and Brown's daughter by a previous marriage, Patricia, born July 9, 1962. Kay also had a child by a previous marriage, Timothy Hoggard, born December 4, 1964. Timothy's natural father died in 1965, and Timothy had lived with his mother and stepfather ever since their

marriage in 1966. Yet, although Brown partially supported Timothy and treated him as his own son, he never adopted the boy.

After the hearing, the trial judge, John W. Winston, an experienced admiralty practitioner, held in a written opinion (App. D) relying on Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) and Mobil Oil Corp. v. Higginbotham, Administratrix, 436 U.S. 618 (1977) that admiralty law controlled and therefore all the dependent relatives, including the dependent stepson, Timothy Hoggard, were entitled to share in the fund. The trial court found maritime law uniformity requires "that the provisions of the Virginia Wrongful Death statute shall no longer apply to

cases involving the death of non-seamen persons upon the territorial waters of that state, that the non-statutory general maritime law controls instead." (App.D-14).

Patricia Brown appealed to the Supreme Court of Virginia contending that the trial court erred in applying admiralty law. In the trial court, she admitted Moragne applied but on appeal she argued that despite the allegation in the Administratrix's motion for judgment stating "this claim is governed by the General Maritime Law of the United States" the cause of action asserted by the Administratrix was governed solely by the Virginia Wrongful Death Act.

The Administratrix insistantly raised the federal question issue contending in the Supreme Court of

Virginia "that federal substantive law...grants both the remedy and identifies the beneficiaries in a maritime wrongful death claim" (See Opinion App. A-9), that the applicable law is the "general maritime law as developed by the Supreme Court of the United States" and "that a state trial court is bound to apply federal maritime law in a case within federal admiralty jurisdiction." (Opinion App. A-10).

The Supreme Court of Virginia held that "even after Moragne, there is no federal cause of action for the death of a non-seaman in state territorial waters occasioned by negligence; therefore Kay's (Administratrix) cause of action is cognizable only under Virginia law and she cannot rely upon admiralty law...." (App. A-19,20)

REASONS FOR GRANTING THE WRIT

I.

THE VIRGINIA SUPREME COURTS HOLDING THAT "EVEN AFTER MORAGNE THERE IS NO FEDERAL CAUSE OF ACTION FOR THE DEATH OF A NON-SEAMAN IN STATE TERRITORIAL WATERS OCCASIONED BY NEGLIGENCE" IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT COMMENCING WITH MORAGNE V. STATES MARINE LINES, 398 U.S. 375 (1970).

The decision of the Virginia Supreme Court reversing the trial court is based on the erroneous belief that Moragne and its progeny are limited to cases involving wrongful death occasioned solely by unseaworthiness. (App. A-17). Because of this belief, the Virginia decision is the exact holding of the Harrisburg, 119 U.S. 199 (1886) and parallels The Tungus v.

Skovgaard, 358 U.S. 88 (1959) both overruled by Moragne.

The now overruled opinion of the trial court was correctly based on the premise that Moragne; Sea-Land Services, Inc. v. Gaudet, Admrx, 414 U.S. 573 (1974) and Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), were controlling in a negligence case and that therefore, the court was of the

> "firm conclusion that the provisions of the Virginia Wrongful Death statute shall no longer apply to cases involving the death of non-seamen persons upon the territorial waters of that State, that the non-statutory general maritime law controls instead . . .. (App. D-14)
>
> * * *
>
> Congress having declared that the wife, husband, parent, child, dependent relative of a person killed outside a state's territorial waters shall be the exclusive beneficiaries of any wrongful death benefits, this court now holds that the same relatives

> shall likewise be the exclusive beneficiaries of any such benefits derived from a death upon a state's territorial waters." (App. D-15,16)

The Petitioner herein made no claims based upon unseaworthiness as her husband's death occurred some two and one-half years after the 1972 Amendments to the Longshoremen's and Harborworkers' Compensation Act (hereinafter LHWCA) barred claims based on that doctrine. This is mentioned only because the opinion of the Virginia Supreme Court appears to consider this issue critical and dwells on the failure of the Petitioner to allege such a cause:

> "An allegation of negligence therefore, is not tantamount to an allegation of unseaworthiness. Yet, there is no word in Kay's motion for judgment suggesting that she asserts a federal cause of action based upon the unseaworthiness of the vessel

> upon which Brown met his death. The motion alleges negligence only...(App. A-19).

In Moragne this Court characterized the lower court's holding in The Harrisburg at 380:

> "That case, like this, was a suit on behalf of the family of a maritime worker for his death on the navigable waters of a State. Following several precedents in the lower federal courts the trial court awarded damages against the ship causing the death, and the circuit court affirmed, ruling that death by maritime tort "may be complained of as an injury, and the wrong redressed under the general maritime law." 15 F 610, 614 (1883) [Emphasis added]

Upon review the Harrisburg Court concluded at 119 U.S. 213 "We are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law." "Thereafter, suits arising out of maritime fatalities were founded by

necessity on state wrongful death statutes. "Higginbotham at U.S. 620. Higginbotham differentiated between Moragne's applying one national rule to fatalities in territorial waters and a slightly narrower rule to accidents farther from land." See Footnote 18 at U.S. 624.

When certiorari was granted in Moragne, the Solicitor General was requested to participate amicus curiae "to reconsider the important question of remedies under the federal maritime law for tortious deaths on state territorial waters."

In response, the question presented by the Solicitor General's amicus brief was "Whether a cause of action for wrongful death may be maintained under maritime law, independent of any statute expressly creating such a right." The

Solicitor General successfully urged this Court to overrule The Harrisburg and The Tungus v. Skovgaard, 358 U.S. 88.

It was the Harrisburg's denial of a recovery for negligently caused wrongful death on state territorial waters under the non statutory general maritime law which was repudiated and overruled by Moragne. In Moragne this Court characterized the Harrisburg a various times as being "dubious even when rendered;" "barbarous" and a "disgrace to a civilized people."

Thus it would appear that while the Virginia Court recognizes that the Harrisburg has been overruled, the decision complained is in complete accord with the Harrisburg of 1886 and

The Tungus of 1959 and therefore in direct conflict with this Court.

Moragne created a new maritime wrongful death remedy, not a statutory creation, but Judge made. In Gaudet supra, at U.S. 583, the policy underlying that new remedy was "to insure compensation of the dependents for their losses resulting from the decedents death." (Id.)

Negligent conduct causing loss to others constitutes a traditional maritime tort. Matter of Oswego Barge Corp., 664 F2d. 327 (2nd Cir. 1977) Pope & Talbot Inc. v. Hawn, 346 U.S. 406, 413 & n.6. (1954)

In Higginbotham supra, this Court again retraced the history of The Harrisburg stating at U.S.621, "... but in territorial waters The Harrisburg made state law the only source of a

wrongful death remedy, the continuing impact of that decision produced uncertainty and incongruity."

The Higginbotham Court went on to give the rationale for Moragne's supplementing remedy in coastal waters (436 U.S. at 625).

> "In Moragne, the Court recognized a wrongful-death remedy that supplements federal statutory remedies. But that holding depended on our conclusion that Congress withheld a statutory remedy in coastal waters in order to encourage and preserve supplemental remedies." 398 U.S. at 397-398.

Higginbotham at U.S. 623 fn 16 quotes Chief Judge Brown of the 5th Circuit in Law v. Sea Drilling Corp., 523 F2d. 793 (1975):

> "No longer does one need a state remedy. No longer does one need a state court, or The Admiralty as a Court, or DOHSA as a remedy. There is a federal maritime cause of action for death on navigable waters--any navigable waters--and it can be enforced in any court."

American Export Lines, Inc. v. Alvez, 446 U.S. 274, (1980) and Moragne tell us that availability of general maritime remedies should not be determined by whether or not the injuries complained of prove fatal or nonfatal.

Alvez point out further

> "But general federal maritime law is a source of relief for a longshoreman's personal injury, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 412-414 (1953), just as it is a source of remedy for wrongful death, Moragne, supra. Within this single body of judge-formulated law, there is no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society. The vitality of the longshoreman is logically irrelevant once we have accepted the principle that injury suffered by a longshoreman's spouse from loss of society should be compensable, when proved.

> Nothing intrinsic to the Gaudet rule, therefore, should cabin its application to wrongful death."

The shipowner in Alvez unsuccessfully argued that the right to sue for loss of consortium due to a maritime injury should not be allowed because it was not expressly authorized by Congress either in the Death on the High Seas Act 46 U.S.C. Section 762 or the Jones Act 46 U.S.C. 688.

In turning aside this argument, the Court stated at 446 U.S. 281-2:

> ". . .. But it is a settled canon of maritime jurisprudence that "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." [citations omitted] . . . Plainly, neither statute embodies an "established and inflexible" rule here foreclosing recognition of a claim for loss of society by judicially crafted general maritime law.

Clearly if these federal statutes concerned with maritime remedies cannot limit or foreclose a remedy in a non-statutory maritime claim the Virginia statutory law embodied in the Virginia Wrongful Death Act cannot.

In Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 103, 76 L.Ed2d 768 (1983), this Court in a longshoreman's case for negligently inflicted personal injuries, reversed the Court of Appeals and held that federal rather than state law applied in determining the method of discounting the injured longshoreman's lost earnings to present value since such a cause of action is rooted in federal maritime law to which the reasons supporting a state rule are not necessarily applicable. In so holding, the Court said at page 789 L.Ed:

> "The Court of Appeals correctly noted that respondent's cause of action 'is rooted in federal maritime law.' Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409, 98 L.Ed. 143, 74 S.Ct. 202 (1953). See also HR Rep No. 1441, 92d Cong. 2d Sess. . . ..Moreover, the reasons which may support the adoption of the rule for a State's entire judicial system--for a broad class of cases encompassing a variety of claims affecting a number of different industries and occupations--are not necessarily applicable to this special class of workers covered by this Act."

In Foremost Insurance Co. v. Richardson, 457 U.S. 668, 73 L.Ed2d 300, reh. den. 74 L.Ed2d 160 (1982), this Court held that a collision of two small pleasure boats on a navigable river in Louisiana fell within the admiralty jurisdiction of the federal courts. The Court stated at pages 675, 676 U.S. 306, 307 L.Ed:

"The federal interest 'can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct." [Emphasis in original]

* * *

"Moreover, the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities."

The Foremost opinion points out at p. 677 U.S. that

"Congress directed that '[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury. . . caused by a vessel on navigable water. . . .' Extension of Admiralty Jurisdiction Act, 62 Stat 496, as set forth in 46 U.S.C.§740 [46 U.S.C.S. §740]."

Justice Powell in dissent recognized at page 678 U.S.:

"This Court now affirms in a decision holding that 'all operators of vessels on

navigable waters are subject to uniform [federal] rules of conduct' conferring federal jurisdiction over all accidents." [Emphasis in original]

* * *

"The Court's opinion largely ignores the fact that expansions of federal admiralty jurisdiction are accompanied by application of substantive--and preempting--federal admiralty law. Southern Pacific Co. v. Jensen, 244 U.S. 205, 214-218, 61 L.Ed. 1086, 37 S.Ct. 524 (1917); see Kossick v. United Fruit Co. 365 U.S. 731, 738-742, 6 L.Ed.2d 56, 81 S.Ct 886 (1961)." at U.S. p. 685.

As quoted by Justice Marshall, "if the wrong occurred on navigable waters, the action is within admiralty jurisdiction." Foremost Ins. Co. v. Richardson supra.

The cases of Ford v. Wooten, 681 F.2d. 712, (11th Cir. 1982), cert. denied, 103 S.Ct. 1187, 51 LW 3611, (1983) and Ivy v. Security Barge Lines,

Inc., 606 F.2d 254, (5th Cir. 1979), cert. denied, 446 U.S. 956 (1980), relied on in support of the Virginia Court's claim, that there is no federal general maritime law cause of action under Moragne are not applicable to non-seaman deaths in territorial waters because both cases dealt with situations where there was a congressional pre-emption or preclusion found in the Death on the High Seas Act and the Jones Act.

The development of the general maritime law in this Court based on Moragne compels the reversal of the Virginia Supreme Court on this issue alone.

II.

THE DENIAL OF THE PETITIONER'S RIGHT OF RECOVERY FOR NEGLIGENTLY CAUSED WRONGFUL DEATH UNDER THE GENERAL MARITIME LAW IS IN CONFLICT WITH THE FEDERAL COURTS OF APPEALS AND OF OTHER STATE COURTS OF LAST RESORT.

Virginia stands alone in its interpretation of Moragne. There do not appear to be any reported cases after Moragne and the 1972 Amendments to the LHWCA abolishing unseaworthiness as a method of recovery for those covered by the Act that support the Virginia Court's ruling in Brown. On the contrary, all cases involving negligent wrongful death of non-seamen on territorial waters uphold such a general maritime cause of action either on the basis of Moragne-Gaudet or by direct referral to the LHWCA. The LHWCA cases will be dealt with separately hereafter.

In McMillan v. Marine Sulphur Shipping Corp., 607 F.2d 1034 (2nd Cir. 1979) cert. denied 445 U.S. 905 (1980) plaintiff's personal representative brought a wrongful death action grounded on negligence principles for her husband's death which occurred in November 1973, on the navigable waters of Tampa, Florida. The District Court entered an award for the plaintiff against the shipowner which was reversed by the Circuit Court. The Circuit Court recognized the principles of Gaudet and the right of recovery on a showing of negligence, but reversed on the grounds that "here there is simply no basis for finding fault on the part of the ship."

In Richards v. Blake Builders Supply, Inc., 528 F2d 745 (4th Cir. 1975), the court while not mentioning

Moragne held that a fatality arising out of the explosion of a motorboat on Lake Gaston, partly within the State of Virginia, was within the Federal admiralty jurisdiction and the general maritime law applied.

In a non-death case, Byrd v. Byrd, 657 F.2d 615 (4th Cir. 1981), a case dealing with spousal-immunity in a Virginia maritime tort context, Moragne was cited for the proposition

> "A state law, even though it does not contravene an established principle of admiralty law will, nevertheless, not be applied where its adoption would impair the uniformity and simplicity which is a basic principle of the federal admiralty law, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 402, 90 S.Ct. 1772, 1788, 26 L.Ed.2d 339 (1970); Kermarec, Supra, 358 U.S. at 631, 79 S.Ct. at 410, or where its application would defeat an otherwise meritorious maritime cause of action. St.

Hilaire Moye v. Henderson, 496 F.2d 973, 980 (8th Cir. 1974), cert. denied, 419 U.S. 884, 95 S.Ct. 151, 42 L.Ed.2d 125 (1974). . . . .

In Bodden v. American Offshore Inc., (5th Cir. 1982), 681 F.2d 319, we find at page 326:

> "The Fifth Circuit, a familiar face if not a charter member at the admiralty, frequently has had occasion to assess and apply the Moragne-Gaudet-Higginbotham line of cases. In analyzing those decisions, we take careful note of where the accident took place, for of such differences, much ado is made. In Matter of S/S HELENA, 529 F.2d 744, 1976 A.M.C. 2022 (5th Cir. 1976) (territorial waters), Judge Wisdom, writing for the Court, held that Moragne applied retroactively and that the federal general maritime remedy for wrongful death which it established 'precluded recognition in admiralty of state statutes.' 529 F.2d at 753. Thus the varying state laws on wrongful death, which for so long provided the only remedy if the injury occurred in territorial waters, fell before the banner of uniformity. Accord, Nelson v. United States, 639 F.2d 469,

> 473 (9th Cir. 1980) (San Francisco Bay). See also Law v. Sea Drilling, supra (Brown, Ch. J.) (outer continental shelf)."

The 6th Circuit in Petition of United States Steel Corporation, 436 F2d. 1256 (6th Cir. 1970) cert den 402 U.S. 987, reh. den. 403 U.S. 924, citing Moragne at 1279 states the

> "creation of a right of recovery for wrongful death under the maritime law. . . permits all facets of that right of recovery including the measure of damages to be governed by principles of maritime law."

Recognition of that right dictates that in order to promote uniformity "the measure of recovery must be governed by principles of that law. . .."

The 7th Circuit has had at least two opportunities to consider the issue of Moragne negligence. In Glenview Park District v. Melhus, 540 F.2d 1321, 1323 (7th Cir. 1976) cert denied 429

U.S. 1094, 97 S.Ct. 1109, 51 L.Ed.2d 541 (1977) an admiralty wrongful death action was upheld on evidence of the park districts negligence in supervising a river canoe trip which resulted in the death of plaintiff's husband. The same result was approved in First Nat. Bank of Chicago v. Material Serv. Corp., 597 F.2d 1110 (7th Cir. 1979) involving a wrongful death arising out of the collision of a pleasure boat and a barge tow on local waters.

In Nelson v. United States, (9th Cir. 1980) 639 F.2d 469, that Circuit held that Moragne preempts state wrongful death statutes at page 473:

> "We hold that the need for uniformity in maritime wrongful death actions requires extension of Moragne to cover claims based on negligence, to the exclusion of state wrongful death statutes. See Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 744

(5th Cir. 1976) (Wisdom, J.); Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975)."

See also Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77 (9th Cir. 1983) a seaman's claim where attempted reliance on a Alaska's wrongful death act was rejected at page 80 on the basis of the Moragne uniformity preemption. See also Williams v. United States, 711 F.2d 893 (9th Cir. 1983) applying Moragne to an aviation wrongful death under the general maritime law.

State Courts have also consistantly followed Moragne. Scholl v. Town of Babylon, 466 N.Y.S.2d 976 (A.D. 2 Dept. 1983). The New York Court applies Moragne to a fatal collision between a pleasure boat and crabber swimming in local waters.

In an Oregon Court of Appeals case, Wheeler v. Bonnin, 47 Or.App. 645 P.2d

355 (1980), a negligence claim arising out of a 1974 fatal collision of two motorboats upon state territorial waters, the Court recognized the federal remedy created in Moragne and further held "the law to be applied to a cause of action cognizable in maritime law is maritime law." Kermarec v. Transatlantique, 358 U.S. 625, 627, 79 S.Ct. 406, 3 L.Ed2d 550 (1959).

In Sanders v. Richmond, 579 S.W.Rep.2d 401 (Mo.Ct. of App. 1979), the parties were in yet another fatal motorboat accident upon the Mississippi River. The defendant, Richmond, like Patricia Brown, claimed that the plaintiff did not plead a nonstatutory federal maritime claim but instead stated a claim under the state wrongful death statute. The Court rejected this defense at page 407 stating:

"We believe, however, that Moragne did make clear that maritime principles of negligence form the basis for recovery in a cause of action brought under the common law wrongful death cause of action it announced, and that a state court is required, therefore, to apply the federal maritime law in a cause for wrongful death suffered on the navigable waters within the territorial waters of the state in whose court the remedy is pursued. 398 U.S. l.c 378(1), 90 S.Ct. 1772."

Lewis v. Timco, Inc., 716 F.2d 1425 (5th Cir. 1983) discusses maritime choice of law principles at page 1428:

"Most notably, courts applying maritime law have repeatedly rejected choice of law notions that would reference state tort doctrines. State workers' compensation schemes were held to be inapplicable to personal injury claims arising from maritime related work on vessels in navigable waters. Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). State negligence law was held not applicable in a maritime personal injury suit, Carlisle Packing Co. v. Sandanger, 259

U.S. 255, 42 S.Ct. 475, 66 L.Ed. 927 (1922), including state law defenses of contributory negligence, Pope & Talbot, Inc. v. Hawn, 346 U.S. at 409-11, 74 S.Ct. at 204-06. In 1948 Congress extended admiralty jurisdiction shoreward with the Extension of Admiralty Act, 46 U.S.C. §740, which provides that maritime jurisdiction shall include loss caused by a vessel on navigable water even if the injury is finally suffered on land. Even resort to states' wrongful death statutes ended with recognition of a general maritime law right of recovery for wrongful death. Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970); see Matter of S/S Helena, 529 F.2d 744 (5th Cir. 1976)."

III.

THE DENIAL OF THE PETITIONER'S FEDERAL RIGHT OF RECOVERY FOR NEGLIGENTLY CAUSED WRONGFUL DEATH IS IN CONFLICT WITH THE PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. §901, ET SEQ.

The LHWCA Amendments of 1972, 33 U.S.C. §901, et seq. effected major changes in the relationship between shipowners, stevedores, and longshoremen. Section 905(b) (App. L-1) eliminated third party actions by longshoremen against the vessel on which injury occurs based on the shipowner's warranty of seaworthiness, a right of action which had been earlier sanctioned by this Court in Seas Shipping Co. v. Sieracki 328 U.S. 85 (1946).

Section 905(b) in conjunction with Section 933 of the Act, recognizes recovery for negligent injury or death based upon general maritime law. (App. L-1,4)

The right to pursue a third party claim under §905 was described in

Bynum v. Patterson Truck Lines, Inc., 655 F.2d 643 (5th Cir. 1981).

> "His cause of action is based upon third-party negligence, a recovery recognized as allowable in federal court by Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act."

Section 905(b) provides a maritime statutory negligence claim against the ship. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 165, 168. (1981).

The entitlement of Mrs. Brown and the other plaintiffs to recover for the negligence of Allied as a shipowner under the LHWCA was expressly addressed and awarded in the Complaint of Allied Towing Corporation, 416 F.Supp. 1207, EDVA 1976 (App. J-13,15) and this right was affirmed at 580 F.2d 702. (App. I-10). These holdings were reinforced

in Edmonds v. Compania Generale Transatlantique, 443 U.S. 256, 71 L.Ed. 521, 99 St. Ct. 2753 (1977), where this Court held that a plaintiff such as Mrs. Brown, covered by the LHWCA was entitled to a full recovery from a negligent shipowner with no setoff for the negligence, if any, of a shiprepairer or stevedoring company.

Numerous cases have been found upholding the right of post 1972 LHWCA claimants to pursue a case for negligently caused death on state territorial waters. No cases have been found that would support the Virginia Court's denial of such a claim.

The Widow and Administratrix of Earl Roy Smith, a harbor worker who drowned in March 1973, while scuba diving to inspect a damaged dredge, brought a negligence action to recover

for his death. Smith v. Eastern Seaboard Pile Driving Corporation, 604 F.2d 789 (2nd Cir. 1979). The Court in attempting to determine "whether a shipowner-employer may be held for damages said that the Court must decide if the negligence was "owner occasioned." The Court cited for this proposition Allied Towing Corp. v. Tatem, 580 F.2d 702, 702 (4th Cir. 1978) which is the Brown case in the Fourth Circuit. Smith reversed the lower court and held that the widow's suit was maintainable against the shipowner by virtue of the LHWCA.

Russell v. Atlantic & Gulf Stevedores, 625 F.2d 71 (5th Cir. 1981), recognized a claim based upon general maritime law under the LHWCA asserted by the widow of a boarding agent who drowned in the Mississippi

River while attempting to board the defendant's vessel.

Frankie Lee Migut, age 17 years, was killed on November 28, 1972, two days after the 1972 Amendments were effective. The Court in Migut v. Hyman-Michaels Co., 571 F.2d 352 (6th Cir. 1978) recognized the right of the decedent's estate to recover in a third party negligence action under the LHWCA for the negligence of the vessel owner. The Court pointed out that "Under §905(b), the owners could have been liable to the Migut estate only for negligence of the vessel.

Robertson v. Jeffboat, Inc., 651 F.2d 434 (6th Cir. 1981), affirmed a recovery for negligent wrongful death of a shipbuilder in territorial waters based on the LHWCA. Robertson has been vacated by this Court, 103 S.Ct.

77 L.Ed2d 1382, for further consideration in light of Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 103, 76 L.Ed2d 768, 103 S.Ct. _____(1983).

Ryder v. United States, 513 F.Supp. 551 (DC Mass 1981) allowed the widow of an employee of a private contractor killed in 1976 aboard a United States vessel in navigable waters of Boston Massachusetts to recover for negligently caused wrongful death under the LHWCA.

In Hinson v. SS PAROS, 461 F.Supp. 219 (DC Texas 1978), plaintiff's decedent met his death in the Houston Harbor in 1974 when he fell overboard and drowned. The trial court found negligence on the part of the shipowner which was a proximate cause of Hinson's death. The court further found that it

had jurisdiction of the subject matter and the parties and therefore awarded damages based on the LHWCA.

Jong Hee Park v. United States Lines, Inc, Md.App. 439 A.2d 10 (1982) involved the death of longshoremen ashore in Baltimore who were killed when cranes collapsed due in part to the alleged negligence of the shipowner whose vessel was at the pier. Upon a summary judgment motion, the court found that a cause of action was stated for negligence under the LHWCA.

In two other cases recognizing the right to recover for negligent wrongful death in territorial waters under the LHWCA, the courts found that under the facts of the case, there was no negligence proven. Mayfield v. Wall Shipyard, Inc., 510 F.Supp 605 (DC LA. 1981) and U. S. Fid. & Guar. v.

Jadranska Slobodna Plovidba, 683 F.2d 1022 (7th Cir. 1982).

Congress in passing the 1972 Amendments, recognized a federal cause of action for negligence as a basis for third party actions by longshoremen against shipowners which was intended by Congress to be a uniform federal negligence remedy.

> "See S.Rep. No. 92-1125, at pp. 11,12 (1972) (". . .the committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the state in which the port may be located. The committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law.") [Emphasis added]

IV.

THE REFUSAL OF THE VIRGINIA SUPREME COURT TO APPLY FEDERAL MARITIME LAW TO PETITIONER'S CLAIM FOR NEGLIGENTLY CAUSED MARITIME WRONGFUL DEATH IS IN CONFLICT WITH THE "SAVINGS TO SUITORS CLAUSE" 28 U.S.C. §1333 AND ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES.

Exclusive admiralty jurisdiction is granted to the Federal District Courts pursuant to 28 U.S.C. §1333; however, that section also saves "to suitors in all cases other remedies to which they are otherwise entitled." It is settled law that although this statutory language permits an injured maritime worker to choose between bringing his suit in state or federal court, Federal Maritime Law will govern all such actions, wherever brought. Garrett v. Moore-McCormack Co, 317 U.S. 239, 245-46 (1942); Kermarec v. Compagnie

Generale Transatlantique, (supra). This axiom was reaffirmed in Moragne footnote 1 at U.S. 378, the state court "was bound to apply federal maritime law in a case within federal admiralty jurisdiction."

The uniformity doctrine in maritime law has its ultimate basis in the United States Constitution. Article III, Section 2 of the Constitution extends the judicial power "to all Cases of Admiralty and maritime Jurisdiction." As was long ago interpreted by the Court in The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874), "the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country." Such a doctrine has been constantly reaffirmed in the area of maritime death and personal injury actions, as this Court stated in Moragne in justifying

the rationale for establishing a maritime wrongful death cause of action. The Court, citing The Lottawanna, stated:

> "Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" 398 U.S. at 401-402.

State statutes are not applicable in areas where the "necessary consequences would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish..." Southern Pacific Co. v. Jensen, 244 U.S. 205, 217 (1917).

Thus, Virginia stands alone among the major maritime states in denying to the widow and dependent relatives of a

deceased ship repairman the benefits of the general maritime law. Uniformity of maritime law forbids such a result. Here "exclusively maritime substantive concepts" based in established admiralty law have been contravened by the holding of the Virginia Supreme Court.

V.

THE PRIOR DETERMINATION OF ADMIRALTY JURISDICTION IN THE MULTIPLE FEDERAL COURT RULINGS GROWING OUT OF THE BARGE EXPLOSION CAUSING BROWN'S DEATH PRECLUDE THE VIRGINIA SUPREME COURT FROM FINDING A LACK OF FEDERAL ADMIRALTY JURISDICTION.

The Federal Court's Opinion and Order of August 2, 1976, Complaint of Allied Towing Corporation, etc., 416 F.Supp. 1207 (EDVA 1976) (App. J-13,14), stated "The Court's findings of fact and conclusions of law are res judicata or

collateral estoppel in any subsequent proceedings."

That opinion held that the plaintiffs, including Mrs. Brown as personal representative, could maintain a cause of action under the LHWCA for Allied's negligence in causing Brown's death. 416 F.Supp. 1207 (App. J). Affirmed 580 F.2d 702. (App. I).

See also (App. H), United States v. Allied Towing Corp., (supra), upholding Allied's conviction for Brown's homicide occurring "on the Elizabeth River a navigable water of the United States, within the Eastern District of Virginia, and within the admiralty jurisdiction of the United States.

The only issue left for the trier of fact after the multiple federal court rulings was the issue of the amount of

damages. All other issues had been found as being governed by the general admiralty jurisdiction of the Court or by the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

As Gaudet tells us at U.S. 578-9 res judicata

> "provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' Cromwell v. County of Sac, 94 U.S. 351, 352, [24 L.Ed 195]."

The preclusive effect of former adjudications of federal questions by federal courts upon later state court determinations is discussed in 18 C. Wright, A. Miller & Cooper, Federal

Practice & Procedure § 4468 (1981) where is found at page 651:

> "The Supreme Court has consistantly adhered to the proposition that it has jurisdiction to review state decisions that deal with the res judicata effects of federal judgments. At least to this extent, it is clear that it believes that a federal question is involved."

"As the contention is that the ruling below disregarded decrees of a court of the United States it raised a federal question...." Stoll v. Gottlieb, 305 U.S. 165 (1938) "The case here turns on the effect of the bankruptcy record and so presents the federal question of whether full faith and credit was given to the judgment of the federal court. Myers v. International Trust Co., 263 U.S. 64 (1964).

In a maritime forfeiture case where the initial action was in the federal court followed by a subsequent state action as in Brown, Gelston v. Hoyt, 1818, 3 Wheat. (16 U.S.) 246, 313-322, 4 L.Ed 381, Justice Story stated the question of forefeiture belonged exclusively in the federal court and added: "Indeed no principle of general law seems better settled than the decision of a peculiar and exclusive jurisdiction must be completely binding upon the judgment of every other court in which the same subject matter comes incidently into controversy." 3 Wheat. (16 U.S.) at 315.

"The question of whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and law of the United

States. . . ." Crescent City Live Stock Co. v. Butchers Union Slaughter-House Co., 120 U.S. 141, 146 (1887).

"In our system of jurisprudence the usual rule is that the merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum. Kremer v. Chemical Construction Corp., 456 U.S. 461, 485 (1982).

All of the federal court decisions herein dealing with Brown's death having been properly based either upon admiralty federal question jurisdiction or upon federal statutory provisions dealing with the efficient administration of civil and criminal matters within the federal maritime jurisdiction Virginia should be bound by res judicata, collateral estoppel or issue preclusion so as to be precluded

from finding that there is a lack of federal maritime jurisdiction.

CONCLUSION

It is respectfully submitted that the decision in this case is one of extreme national importance to all maritime interests nationally. It sets an intolerable precedent inconsistant with all other reported decisions, federal and state, and with the national requirements of uniformity in maritime matters. Its immediate effect is to close the courts of Virginia, a maritime state, to all non-seaman suitors alleging a federal cause of action for negligently caused wrongful death on Virginia's territorial waters. Petitioner and all others covered by the

LHWCA are also without a federal remedy for wrongful death in the Virginia Courts.

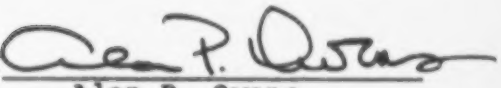
Petitioner submits that per se application of the Virginia Wrongful Death Act so as to preclude federally created rights is repugnant to and violates the constitutional mandate of uniformity under Article 3, Section 2 as delineated in Moragne and frustrates the stated Congressional intent of the Longshoremen's and Harbor Workers' Compensation Act that all maritime injuries be resolved as a matter of federal law.

The Petition for Writ of Certiorari should be granted. The decision and judgment of the Supreme Court of Virginia should be reversed. The well reasoned judgment of the Circuit Court of the City of Norfolk based on

Moragne-Gaudet-Higginbotham principles correctly decided the maritime issues and therefore should be reinstated.

Respectfully submitted,

KAY J. BROWN, ADMX., ETC.

BY 

Alan P. Owens

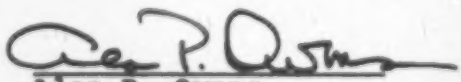
Alan P. Owens
SMITH AND OWENS
250 Monticello Arcade
Post Office Box 3646
Norfolk, Virginia 23514

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on or before April 19, 1984, three copies of the foregoing Petition for Writ of Certiorari and separate Appendix thereto were mailed to S. Miles Dumville, Esquire, 310 South Boulevard, Post. Office Box 14515, Richmond, Virginia 23221, Counsel for Patricia Ann Brown; and three copies of the foregoing Petition for Writ of Certiorari and separate Appendix thereto were hand delivered to Wiley G. Gary, Esquire, 223 Monticello Arcade, Norfolk, Virginia 23514, Guardian ad Litem for Ronnie Edward Brown.

I further certify that all parties required to be served have been served.



Alan P. Owens
Counsel for
Petitioner